Toffoloni v. LFP Publishing Group, LLC Doc. 29 Att. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI,)
as Administrator and Personal)
Representative of the ESTATE)
OF NANCY E. BENOIT,)
) CASE NO. 1:08-cv-00421-TWT
Plaintiff,)
)
vs.)
)
LFP PUBLISHING GROUP, LLC,)
d/b/a Hustler Magazine, et al,)
)
Defendant.)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY PROCEEDINGS

NOW COMES Defendant LFP Publishing Group, LLC, d/b/a Hustler Magazine, et al. ("LFP") and hereby respectfully submits this Memorandum of Law in Support of its Motion to Stay Proceedings filed herewith.

FACTUAL BACKGROUND

On October 6, 2008, this Court issued an Order granting LFP's Motion to Dismiss pursuant to Rule 12(b)(6) for failure to state a claim for relief (the "Motion"). (D.I. 13). Plaintiff appealed that decision to the United States Court of Appeals, Eleventh Circuit and on June 25, 2009, a three-judge panel (the "Panel") reversed and remanded this Court's Order.

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LFP timely filed a Petition for Rehearing *En Banc*, which the Court of Appeals denied on August 27, 2009. The Court of Appeals issued its Mandate on September 4, 2009 (D.I. 27), and this Court adopted the Mandate by an order signed on September 14, 2009 (D.I. 28).

Because LFP contends that the June 25 Panel decision is grave Constitutional error and should be reversed, LFP will timely petition the United States Supreme Court for a writ of certiorari and respectfully moves this court to stay proceedings until such time as the Supreme Court of the United States has ruled on the merits of its petition and, if granted, until a ruling on the merits of the appeal.

LEGAL STANDARD

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North American Co.*, 299 U.S. 248, 254-55, 57 S. Ct. 163, 166 (1936).

A stay pending petition for certiorari is appropriate where there exists: (1) a reasonable probability that certiorari will be granted; (2) a significant possibility that the judgment below will be reversed; and (3) a likelihood of irreparable harm if the judgment is reversed, and is not stayed. *U.S. v. Keystone Sanitation Co., Inc.*, 903 F. Supp. 803, 817 (M.D. Pa. 1995) (citing *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1302, 112 S. Ct. 1, 2 (1991)); *see also U.S. v. Mandycz*, 321 F. Supp. 2d 862, 863-64 (E.D. Mich. 2004); .

ARGUMENT

1. A REASONABLE PROBABILITY EXISTS THAT THE UNITED STATES SUPREME COURT WILL GRANT CERTIORARI

There is a reasonable likelihood that that the Supreme Court will grant certiorari to review the Eleventh Circuit's June 25, 2009 decision. Rule 10 of the Rules of the Supreme Court of the United States sets forth the general criteria which support a grant of certiorari, including where a United States Court of Appeals "has decided an important federal question in a way that conflicts with a decision by a state court of last resort," Sup. Ct. R. 10(a), or "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c). The June 25, 2009 Eleventh Circuit decision satisfies both of these bases for a writ of certiorari.

The Panel committed grave constitutional error when it reversed this Court's well-reasoned order granting LFP's Rule 12 motion to dismiss. As set forth in its

Petition for Rehearing *En Banc*, attached hereto as Exhibit A, LFP will seek certiorari raising, *inter alia*, the following compelling questions of Constitutional import:

1. Whether the decision of the Panel amounts to content-based discrimination against speech prohibited by the freedom of the press guaranteed by the First Amendment to the U.S. Constitution?

2. Whether the Panel's decision causes substantial uncertainty regarding the media's right to comment and publish on matters of public interest, and will result in an unconstitutional chilling effect on the freedom of the press under the First Amendment?

3. Whether the Panel's decision is based on an unconstitutional and erroneous interpretation and application of the Georgia common law right of publicity as that tort is defined by the Georgia Supreme Court?

4. Whether the Panel's decision is contrary to the United States Supreme Court decisions in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 2849 (1977) and *Time v. Hill*, 385 U.S. 374, 87 S. Ct. 534 (1967).

The Eleventh Circuit's decision regarding the application of the "newsworthiness" doctrine under the First Amendment is in direct conflict with the Georgia Supreme Court's decision in *Waters v. Fleetwood*, 212 Ga. 161, 165, 91 S.E.2d 344, 347 (1956) (holding that use of picture in newspaper or magazine in connection with newsworthy event is constitutionally-protected, lawful exercise of free press) and the other decisions of the Georgia Supreme Court defining the contours and limitations of the Georgia common law right of publicity. The Eleventh Circuit's June 25, 2009 decision further conflicts with signficant decisions of the United States Supreme Court defining the Constitutional limitations of such common law torts. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S. Ct. 2849 (1977) and *Time v. Hill*, 385 U.S. 374, 87 S. Ct. 534 (1967).

The United States Supreme Court has historically and in recent years granted certiorari to important cases implicating the freedoms of expression and the press guaranteed by the First Amendment. *See Center for Bio-Ethical Reform Inc. v. City of Springboro*, No. 3:03-CV-057, 2007 WL 4322234, at *2 (S.D. Ohio 2007) (agreeing with defendants that there was reasonable probability that four Justices of the Supreme Court would grant certiorari and majority of at least five would vote to overturn lower court's decision because "Supreme Court in recent years has been particularly solicitous of the doctrine of qualified immunity.") For example, during the 2008-09 term, the U.S. Supreme Court granted certiorari to eight petitioners in cases construing the freedom of expression clause of the First Amendment.[1]

LFP's certiorari petition is likely to be granted because, if left un-reviewed, the Eleventh Circuit decision will result in a profound and unconstitutional chilling effect on the First Amendment rights of not only traditional media, but alternative media, bloggers, and all other publishers on matters of culture, celebrity, entertainment, or current events.

2. A SIGNIFICANT POSSIBILITY EXISTS THAT THE ELEVENTH CIRCUIT'S JUDGMENT WILL BE REVERSED

As described more fully in LFP's petition for rehearing to the Eleventh Circuit (Exhibit A hereto), the Eleventh Circuit's June 25, 2009 decision is serious Constitutional error which jeopardizes fundamental rights guaranteed by the First Amendment. Further, the decision is in direct conflict with the precedent of both the Georgia Supreme Court and the Supreme Court of the United States.

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[1] *Citizens United v. Federal Election Commission*, 129 S.Ct. 594 (2008); *Locke v. Karass*, 129 S. Ct. 798 (2009); *Milavetz, Gallop, & Milavetz, P.A., et al. v. U.S.*, 129 S.Ct. 2766 (2009); *Pleasant Grove City, UT, et al v. Summum*, 129 S. Ct. 1125 (2009) ; *United States v. Stevens*, 129 S.Ct. 1984 (2009); *Ysursa v. Pocatello Education Association, et al.*, 129 S. Ct. 1093 (2009); *Caperton v. Massey*, 129 S. Ct. 2252 (2009); and *Federal Communications Commission v. Fox Television Stations, Inc., et al.*, 129 S. Ct. 1800 (2009).

Courts have cited the Supreme Court's tendency to grant certiorari to cases involving a particular issue, such as the scope of protection guaranteed by the First Amendment, as evidence of the likelihood of reversal supporting a stay of district court proceedings. *See, e.g., Center for Bio-Ethical Reform Inc.*, 2007 WL 4322234, at *2. As noted above, the Supreme Court granted certiorari to eight freedom of expression-related petitioners during the 2008-09 term. As there is a better than reasonable likelihood that LFP's petition for certiorari will be granted, there is a significant possibility that the Panel's decision will be reversed by the Supreme Court after review on the merits.

3. THERE IS A LIKELIHOOD OF IRREPARABLE HARM IF THESE PROCEEDINGS ARE NOT STAYED

Finally, if LFP's Motion to Stay Proceedings is denied, the parties would be irreparably harmed by the cost and expense of litigation this matter on the merits while LFP's petition, and the subsequent appeal on the merits, is pending. It is unlikely that the U.S. Supreme Court will rule on the petition until Spring 2010 at the earliest; and if granted, a final ruling on the merits of the case may not even come until 2011. During that time, the parties will have expended substantial unnecessary resources conducting fact discovery; then expert discovery; drafting and filing *Daubert*, summary judgment and other pre-trial motions; and a trial of the matter before a final resolution of the appeal could be accomplished.

Conversely, neither party would be prejudiced by a stay of the proceedings. *Cf. Center for Bio-Ethical Reform Inc.*, 2007 WL 4322234, at *2-3 (holding that defendants failed to prove irreparable harm because "[t]hey are not now faced with any additional discovery burden: discovery was completed in this case before the pre-appeal summary judgment motions were filed....Thus the only immediate burden [defendants] face is the burden of briefing the currently pending Motion for Summary Judgment.")

In these circumstances, the interests of judicial economy, fairness to the parties, the likelihood of LFP's petition being granted and the Eleventh Circuit's June 25, 2009 decision being reversed, and the costs and burdens associated with fully litigating this case on the merits while such an appeal is pending all weigh in favor of a stay of proceedings until such time as LFP's appeals of the Eleventh Circuit's decision are exhausted.

CONCLUSION

For the reasons asserted above, LFP respectfully moves the Court to stay proceedings until such time as the Supreme Court of the United States has ruled on the merits of its petition for writ of certiorari and, if granted, on the merits of the appeal.

Respectfully submitted this 17th day of September 2009.

/s/ S. Derek Bauer
James C. Rawls
Georgia Bar No. 596050
Barry J. Armstrong
Georgia Bar No. 022055
S. Derek Bauer
Georgia Bar No. 042537

McKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE, Suite 5300
Atlanta, Georgia 30308
(404) 527-4000
(404) 527-4198 (facsimile)

Attorneys for LFP Publishing Group, LLC, d/b/a Hustler Magazine, et al.

CERTIFICATION OF COUNSEL

Pursuant to N.D. Ga. Local Rule 7.1D, I hereby certify that this document is submitted in Times New Roman 14 point type as required by N.D. Ga. Local Rule 5.1B.

/s/ S. Derek Bauer
S. Derek Bauer

CERTIFICATE OF SERVICE

This is to certify that I have this day filed the within and foregoing **Memorandum of Law in Support of Motion to Stay Proceedings** via the CM/ECF system which will automatically send notification to Plaintiff's attorney of record, who is a participant in the CM/ECF system.

Respectfully submitted this 17th day of September 2009.

/s/ S. Derek. Bauer
S. Derek Bauer, Esq.
Georgia Bar No. 042537
McKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE
Suite 5300
Atlanta, GA 30308
Telephone: (404) 527-4000
Facsimile: (404) 527-4198

Attorneys for Defendant-Appellee
LFP PUBLISHING GROUP, LLC